United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 20,209

MAURICE GAITHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellant, the following questions are presented:

1. Whether the fact that appellant was seen by police officers walking down a public street at about 11:30 a.m. on a rainy day carrying a portable television set partially wrapped in a sheet, and with a small crowbar stuck down inside his trousers, constituted probable cause for his arrest without a warrant.

2. Whether, in a trial on an indictment for housebreaking and petit larceny, the trial court erred in admitting into evidence a television set, a sheet and a crowbar seized from the appellant after his arrest on a charge of possession of an implement of crime, when, at the time of the arrest, the arresting officers had no probable cause for believing that appellant had committed any crime.

3. Whether, after appellant's arrest on charges of possession of an implement of crime and carrying a dangerous weapon, the failure of the arresting officers to take appellant directly to the station house, his subsequent detention in custody for several hours before a charge of housebreaking was made, and the failure of the police to take him before a judicial officer until the day following the arrest, constituted a violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

4. Whether, in a trial on an indictment for housebreaking and petit larceny, there was sufficient evidence to justify the jury's verdict of guilty when the Government failed to prove that appellant had broken and entered, or had entered without breaking, the apartment of the complaining witness with the intent to steal, or that appellant had stolen any property of the complaining witness.

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TABLE OF CASES AND AUTHORITIES

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*Cases or authorities chiefly relied upon are marked by asterisks.

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JURISDICTIONAL STATEMENT

This is an appeal by Maurice Gaither, defendant in a criminal action in the United States District Court for the District of Columbia, from a judgment of conviction on two counts of an indictment filed on December 20, 1965, charging appellant with

violation of Section 1801, Title 22, D.C. Code (Housebreaking), and Section 2202, Title 22, D.C. Code (Petit Larceny). The District Court below had jurisdiction under Sections 305 and 306, Title 11, D.C. Code.

On March 23, 1966, appellant was found guilty by a jury on both counts of the indictment. On April 22, 1966, the District Court adjudged appellant guilty as charged and convicted, and committed him to the custody of the Attorney General for treatment and supervision pursuant to Section 5010(b), Title 18, U.S. Code, under the provisions of the Federal Youth Corrections Act. On May 9, 1966, the District Court granted appellant's notice of appeal in forma pauperis, and on May 11, 1966 ordered that appellant be authorized to proceed on appeal without prepayment of costs.

The jurisdiction of this Court is conferred by Section 1291, Title 28, U.S. Code.

STATEMENT OF THE CASE

At the trial, Thomas P. Stokes testified that, when he left his third floor apartment at 1613 Harvard Street, N.W., Washington, D.C., at 9:00 or 9:10 a.m. on November 16, 1965, to go to work, both the front door and the service door of the apartment were locked, his portable television set was in the den, and his mother was in the apartment (Tr. 66-69, 76-77).

At approximately 11:00 a.m., Stokes received a telephone call at his office from his mother, the subject matter of which was not brought out by the testimony, and immediately left his office and returned to his apartment, arriving at about 11:15 or 11:20 a.m. (Tr. 67-68, 78). On arrival at the apartment, he observed that his television set was missing, and immediately called the police and reported the loss (Tr. 69, 73). At about 11:30 or 11:40 a.m., two police officers arrived at the apartment, and were given a description of the missing television set by Stokes (Tr. 73-74). Although Stokes examined his apartment thoroughly upon his return from his office, he found nothing wrong other than the loss of the television set (Tr. 79). On cross examination, he admitted that there were no scratches or marks on the front door to the apartment to indicate a forced entry, other than some old scratches which had been on the door ever since he had moved in (Tr. 79-80).

Stokes' mother was not called by the prosecution to testify at the trail as to where she was, or what may have occurred in the apartment, during the two hours which elapsed between her son's departure for work and her telephone call to his office.

Appellant testified that he left his home at 1428 Clifton Street, N.W., Washington, D.C., at approximately 10:00 a.m. on the morning of November 16, 1965 to go to the Riggs National Bank at 14th Street and Park Road, N.W., and that after leaving the bank,

he walked over to 15th Street, N.W., via Park Road, and then south on 15th Street (Tr. 152, 156). As appellant approached the 3000 block of 15th Street,[1/] he was approached by a man whom he had never seen before, who asked whether he would be interested in buying a few radios, a camera and a television set (Tr. 152-153, 159-160). The man then took appellant into the basement of an apartment building in the middle of the 3000 block of 15th Street and showed him a few radios, a polaroid camera and a television set which he had wrapped up in a blue sheet in a corner of the laundry room (Tr. 153, 160-161). According to appellant's testimony, he purchased from this man a TV set for $20.00, at which time the man also gave him a small crowbar which appellant noticed lying alongside the items wrapped in the sheet, and which appellant asked if he could have (Tr. 153, 157, 161-162). Appellant then wrapped the TV in the blue sheet (Tr. 153), because it was raining (Tr. 164), noticing that it was still warm (Tr. 163), stuck the crowbar down inside his pants with the curved end hooked over his waistband, but with no part sticking out or visible (Tr. 168-169), left the building and walked south on 15th Street carrying the TV (Tr. 153). Appellant testified that it was then about 11:30 a.m. (Tr. 164).

1/ Tr. 152, 153 show that the reporter originally transcribed the testimony as "thirty hundred" block of 15th Street, but erroneously changed "thirty" to "thirteen".

When he reached Harvard Street going south on 15th Street, appellant crossed to the west side of 15th Street, and stopped there in an attempt to catch a cab (Tr. 153, 165-166). When he was unable to catch a cab, he continued to walk south on 15th Street, past Girard Street to Fuller Street, and turned left into the 1400 block of Fuller Street, after noticing that two men walking on 15th Street, one on one side of the street and one on the other, appeared to be peculiarly interested in him (Tr. 153-154).

Officers Joseph J. King and Robert P. Ropel, of the Metropolitan Police Department, testified that on November 16, 1965, they were assigned to plain clothes duty with the Tactical Force in the 10th Precinct because of numerous housebreakings in that precinct (Tr. 10, 24, 83, 106-107). At approximately 11:30 a.m., the officers, wearing old civilian clothes, were walking north on the east side of 15th Street, N.W., in the 2900 block, having parked Officer King's private car on the corner of 15th and Harvard Streets, when they observed appellant rounding the corner from Harvard Street, carrying in front of him what appeared to be a television set partially wrapped in a blue sheet. When they saw appellant, the officers stopped, letting appellant pass them on the opposite side of the street going south, whereupon King crossed 15th Street and fell in behind appellant, approximately 20 or 25 feet behind him, while Ropel stayed on the east side of 15th Street and walked south

in a position diagonally behind appellant (Tr. 9-11, 16-17, 19-20, 22-27, 84-87, 113-114, 120-121).

King testified that, as he followed defendant down 15th Street, he saw the handle of a crowbar sticking out of the rear of appellant's trousers from underneath his jacket (Tr. 18, 21, 23, 87, 118). Ropel testified that he saw the crowbar from across 15th Street, and that it was pushed down in appellant's pants on the side, sticking out from underneath his jacket (Tr. 29, 31-32). On the contrary, appellant testified as previously noted that the handle of the crowbar was inside his trousers and that the curved end was not visible (Tr. 168-169).

After appellant turned into Fuller Street, King ran after him and called to him to stop, whereupon appellant stopped and turned around to face King, still holding the television set against his stomach partially covered by the sheet. Ropel came up behind King and stood directly behind appellant after the latter had stopped (Tr. 11, 17-18, 22, 28, 87-88, 107-108, 122, 127-128, 130-131, 134). King then showed appellant his police badge and identified himself as a police officer, whereupon appellant exclaimed "I'll be damned"[2/] because he realized that, if the TV had been stolen by the man from

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2/ Ropel agreed with appellant as to the language of the exclamation (Tr. 28, 123, 130). King testified that appellant said "Oh, my God" (Tr. 11, 20, 88, 107-108).

whom he bought it, he might be held liable (Tr. 7, 17, 88, 122-123, 154, 166-167). King then asked appellant where he got the TV set, and appellant answered by saying that he had bought the TV for $20.00 from a male stranger in the basement of an apartment house on 15th Street, the address of which he did not know, but which he could point out (Tr. 11-12, 13, 20, 88, 123).

The officers also testified that King continued to question appellant as to what he was doing with the crowbar, where he got the crowbar and the sheet, and whether he was employed, that appellant answered by saying that he got the crowbar and sheet in the same place as the TV and that he was unemployed, but attending night school, and that King then placed appellant under arrest for possession of a burglary tool, the crowbar (Tr. 12, 19, 20, 30, 32-33, 89-90, 95-96, 124). On the contrary, appellant testified that the officers did not find the crowbar until after he had been placed under arrest, and when, while walking back to 15th Street, King ran his hands over appellant, searching him, and found the crowbar underneath his coat (Tr. 154).

During King's questioning, the officers kept appellant between them, King in front and Ropel behind, and kept him holding the TV, so as to prevent him from escaping (Tr. 15-16, 18, 28-29, 128, 130-131). The officers further testified that, after appellant had been arrested, they had him put the TV down, examined

it for serial and model numbers, searched appellant and found and seized a knife with a four inch blade and some money. Appellant was then charged with carrying a dangerous weapon (Tr. 12, 30, 96, 97, 101-102).

After the arrest, the officers walked appellant back up 15th Street to King's car at the corner of 15th and Harvard Streets, placed the TV set and the sheet in the car, and then told appellant to take them to the place where he said he had bought the TV. Appellant led the officers to the basement of an apartment house in the 3000 block of 15th Street, and pointed out the area where he said the TV set, crowbar and sheet, together with a few radios and a polaroid camera, lay on the floor when he bought the TV. However, neither the radios and camera, nor the man from whom appellant said he bought the TV, could be found (Tr. 12-13, 30-31, 96, 154, 167-168, 177).

After failing to find the man described by appellant, the officers took appellant back to King's car and then took him, the TV set and the other items which had been seized from him to the 10th Precinct station house (Tr. 102, 154) where it is presumed he was later booked on charges of possession of an implement of crime, i.e., the crowbar, and possession of a dangerous weapon, i.e., the knife. Appellant was never indicted on either of these charges.

At about 2:00 p.m. on the same day, November 16, 1965, a report came to the 10th Precinct concerning Stokes' complaint that his television set was missing, whereupon it was discovered that the make and serial number of the TV which King and Ropel had seized from appellant corresponded to Stokes' description of his missing set (Tr. 102-105). Stokes was then called to the 10th Precinct station house where he identified as his the TV set taken from appellant (Tr. 74, 103). Although Stokes could not then identify the blue sheet, he later, at his mother's suggestion, checked his bed linen and found that a blue sheet was also missing (Tr. 71). After Stokes had identified the TV, appellant presumably was booked on a further charge of housebreaking.

Appellant testified that he had never entered the Stokes apartment, and had not taken any property from Stokes (Tr. 154-155, 170).

Although the record in the District Court is silent on the point, appellant asserts that he was not brought before a judicial officer on any of the three charges of possession of an implement of crime, possession of a dangerous weapon and housebreaking until the following day, November 17, 1965, after participating in a line-up at Police Headquarters, approximately 24 hours after he was arrested.

On the first day of the trial below, before the jury was impaneled, appellant's counsel moved to suppress, as evidence at the trial, all of the physical evidence which was seized from appellant after his arrest, including the crowbar and the knife (Tr. 6). The District Court denied the motion (Tr. 50) and admitted the crowbar in evidence (Tr. 147), but at the same time refused to permit any testimony with respect to the knife (Tr. 100, 133).

STATUTES AND RULES INVOLVED

Amendment IV, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 22, Section 1801, D.C. Code (Housebreaking):

> "Whoever shall, either in the night or in the daytime break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

Title 22, Section 2202, D.C. Code (Petit Larceny):

> "Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered."

Title 22, Section 3601, D.C. Code (Possession of Implements of Crime):

> "No person shall have in his possession in the District any instrument, tool, or other implement for picking locks or pockets, or that is usually employed, or reasonably may be employed, in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement. Whoever violates this section shall be imprisoned for not more than one year and may be fined not more than $1000, unless the violation occurs after he has been convicted in the District of a violation of this section or of a felony, either in the District or in another jurisdiction, in which case he shall be imprisoned for not less than one nor more than ten years."

Title 23, Section 306, D.C. Code (Arrests Without Warrant For Unlawful Possession of Implements of Crime - Burglar Tools - Weapons - Lottery Tickets - Stolen Property):

> "(a) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of any section listed in subsection (b), by police officers, as in the case of a felony, upon probable cause that the person arrested is violating the section involved at the time of the arrest.
>
> (b) Subsection (a) shall apply with respect to section 22-3601 (possession of implements of crime), sections 22-3203, 22-3204, and 22-3214, providing for the control of dangerous weapons in the District, and section 22-1502 (possession of lottery tickets).

(c) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of section 22-2202 (petit larceny), by police officers, as in the case of a felony, upon probable cause that the person arrested has in his possession at the time of the arrest, property taken in violation of that section.

(d) No evidence discovered in the course of any arrest, search, or seizure authorized by this section shall be admissible in any criminal proceeding against the person arrested unless at the time of such arrest he was violating one of the sections referred to in subsection (b) or had in his possession property taken in violation of the section referred to in subsection (c)."

Rule 5(a), Federal Rules of Criminal Procedure (Appearance before the Commissioner):

"(a) An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 52(b), Federal Rules of Criminal Procedure (Plain Error):

"(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

I. Appellant's arrest without a warrant on a charge of possession of an implement of crime was without probable cause and therefore illegal.

II. The trial court erred in denying appellant's motion to suppress as evidence at the trial the articles seized from him incident to his unlawful arrest.

III. The failure of the police to take appellant directly to the station house after his arrest, and to take him without unnecessary delay before a judicial officer, constituted a violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

IV. There was insufficient evidence to justify the verdict of the jury that appellant was guilty of housebreaking and petit larceny.

SUMMARY OF ARGUMENT

At the time of appellant's arrest without a warrant for possession of an implement of crime, the arresting officers had no knowledge that any crime had been committed involving the implement in appellant's possession, and no reason to believe that appellant had committed any crime. Since the arrest occurred in broad daylight on a public street, when appellant was conducting himself in an orderly manner, it is evident that the arrest was based on mere

suspicion of the arresting officers and therefore unlawful. The fact that, several hours after the arrest, the television set seized from appellant was identified as the property of the complaining witness, cannot cure the illegality of the arrest, or make admissible in evidence the articles which were unlawfully seized from appellant as "fruits" of the arrest.

The illegality of appellant's arrest was compounded by the failure of the police to take him directly to the station house after the arrest, and to take him without unnecessary delay before a judicial officer as required by Rule 5(a) of the Federal Rules of Criminal Procedure. During this unnecessary and unreasonable delay, the police developed further evidence, not available prior to the arrest, which was introduced at the trial and undoubtedly prejudiced the jury in finding appellant guilty on both counts of the indictment.

Furthermore, the evidence introduced was insufficient to prove beyond a reasonable doubt the allegations of the indictment. This insufficiency is so apparent as to constitute a plain defect affecting substantial rights of appellant of which this Court may take notice under Rule 52(b) of the Federal Rules of Criminal Procedure, even though the defect was not brought to the attention of the trial court.

ARGUMENT

I

Appellant's arrest without a warrant on a charge of possession of an implement of crime was without probable cause and therefore illegal.*

Appellant contends that his arrest and the incident search and seizure from his person of the crowbar, television set and sheet in which the TV was partially wrapped were unlawful because the arresting officers had no probable cause to make the arrest without a warrant.

Appellant was walking down a public street in the Northwest section of the District of Columbia in an orderly manner, about 11:30 on a rainy morning, carrying in his arms a portable television set partially covered by a sheet to protect it from the rain. He also had stuck down inside his trousers a small crowbar of which, according to his testimony, no part was visible. As appellant walked south on 15th Street from the corner of Harvard Street, he was observed by two police officers in plain clothes who were walking north on the opposite side of 15th Street. At this time, the officers were simply

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*With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 9-12, 14-34, 83-92, 95-97, 101-102, 107-108, 111-117, 120-131, 133-134, 152-154, 164-170, 173.

patrolling the area and had received no report of a stolen TV set, nor did they possess any other knowledge that would have given them reasonable grounds for believing that a crime had been committed and that appellant had committed it. Cf. Bynum v. United States, 104 U.S. App. D.C. 368, 262 F.2d 465; White v. United States, 106 U.S. App. D.C. 246, 271 F.2d 829. Nevertheless, the officers turned around and followed appellant for approximately two blocks, King crossing the street and falling in behind appellant, approximately 20 or 25 feet behind him, while Ropel stayed on the other side of the street in a position diagonally behind appellant.

During this time, appellant became aware of the fact that two men in old civilian clothes appeared to be peculiarly interested in him, and may well have, as the officers testified, quickened his walking pace. However, at no time did he attempt to run away from the men who were following him. When appellant turned from 15th Street into Fuller Street, King broke into a run, ran up behind appellant and called to him to stop. Appellant stopped and turned around to face King, still holding the television set, while Ropel came up and took a position directly behind appellant so as to prevent any attempt to escape. When King then showed his badge and identified himself as a police officer, appellant had good reason to

believe that he had been arrested, as evidenced by his exclamation "I'll be damned", because he realized that, if the TV set had been stolen by the man from whom he bought it, he could be in trouble.

It is submitted that appellant's arrest occurred at this time, when King identified himself as a police officer and he and his partner Ropel detained appellant, positioning the latter between them and keeping him holding the TV set in an obvious maneuver to restrain his freedom of movement. Henry v. United States, 361 U.S. 98, 103; Morton v. United States, 79 U.S. App. D.C. 329, 147 F.2d 28; Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310. As this Court said in Long v. Ansell, 63 U.S. App. D.C. 68, 71, 69 F.2d 386, 389:

> "Thus it appears that the word 'arrest' has a well-defined meaning. There must be some detention of the person to constitute arrest. This of course would mean any arrest made or detention in a criminal proceeding, or an arrest in a civil case in execution of the command of some court or officer of justice. Legrand v. Bedinger, 4 T. B. Mon. (Ky.) 539, 540; or as said in Baltimore & O. R. Co. v. Strube, 111 Md. 119, 127, 73 A. 697, 700; 'An arrest is the seizing of a person and detaining him in the custody of the law.' From these authorities it may be concluded, we think, that the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time. People v. Erlanger (D.C.) 132 F. 883."

King then questioned appellant as to where he got the TV set, what he was doing with the crowbar, where he got the crowbar and the sheet, and whether he was employed, and appellant answered his questions by explaining where he obtained the TV, the crowbar and the sheet, and that he was unemployed, but attending night school. According to King, it was after this questioning that he placed appellant under arrest for possession of a burglary tool, the crowbar. However, there is no evidence in the record that King then told appellant the charge on which he was being arrested.

If it was true, as appellant testified, that he had stuck the crowbar down inside his trousers and that no part of it was visible as he walked down 15th Street carrying the TV set, it is obvious that appellant's arrest without a warrant on a charge of possession of an implement of crime was not made "upon probable cause that the person arrested is violating the section involved at the time of the arrest", and was contrary to Section 306(a), Title 23, D.C. Code.

Appellee probably will argue that the police officers saw at least part of the crowbar sticking out of appellant's trousers as they followed him down 15th Street, and that that observation gave the officers probable cause for arresting appellant on the ground of

possession of an implement of crime. However, a crowbar is a tool like those involved in Benton v. United States, 98 U.S. App. D.C. 84, 232 F.2d 341, which, while capable of use in a criminal manner, may be, and usually is, used for legitimate purposes. Consequently, the mere possession of a crowbar cannot give a police officer probable cause for arresting the possessor for violation of Section 3601, Title 22, D.C. Code. As was said in Benton:

> "No rational inference of criminal intent can be drawn from the mere possession of tools which 'reasonably may be employed' in crime."

Moreover, this Court has expressly held that the statute prohibiting possession of implements of crime is unconstitutional as applied to crowbars. Washington v. United States, 98 U.S. App. D.C. 100, 232 F.2d 357.

Even were the testimony of King to be accepted at face value, he arrested appellant on a charge of possession of an implement of crime only because he observed the crowbar in appellant's possession while walking on a public street in broad daylight carrying a television set, and in spite of the fact that appellant accounted for his possession of the crowbar. Since, at the time of the arrest, the police officers had no knowledge that any crime had been committed involving a crowbar and a TV set, it would seem

evident that there was no probable cause for appellant's arrest, but that he was arrested on suspicion only. Cf. Bynum v. United States, supra.

It is well established that an arrest without a warrant, to be legal, must be based on evidence which would warrant a man of reasonable caution in the belief that a crime has been committed and that the person arrested has committed it, Carroll v. United States, 267 U.S. 132, 162; Beck v. Ohio, 379 U.S. 89, 91, 96; Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82; and that it cannot be based on "mere suspicion" of the arresting officer. Mallory v. United States, 354 U.S. 449, 454; Henry v. United States, supra, 104; Wong Sun v. United States, 371 U.S. 471, 479; Bynum v. United States, supra. Where, as here, a person is conducting himself in a peaceable and orderly manner, police officers may not assume that he is guilty of a crime, and without a warrant make an arrest and seize a tool the possession of which does not per se give rise to "sinister implications". Bolt v. United States, 55 U.S. App. D.C. 120, 2 F.2d 922; Benton v. United States, supra.

Furthermore, the validity of an arrest must be based on the information which was within the knowledge of the arresting officers at the time of the arrest, and cannot be established by evidence

discovered as the result of a search incident to the arrest. United States v. Di Re, 332 U.S. 581, 595; Henry v. United States, supra, 103. As this Court said in White v. United States, supra:

> "The officer had no warrant of any kind and no probable cause to accost appellant, require him to place his hands in a certain position, and frisk him. Cf. Green v. United States, 104 U.S. App. D.C. 23, 259 F.2d 180. There had been no outcry or report of a felony and appellant committed no misdemeanor in the officer's presence. * * *
>
> It hardly needs repeating that the strength of the evidence as proof of guilt does not serve retroactively to validate the invalid means by which the evidence was secured, so as to permit its use on the trial of the one whose rights are violated."

On the basis of all of the testimony concerning his arrest, appellant submits that the arrest was without probable cause and therefore unlawful.

II

> The trial court erred in denying appellant's motion to suppress as evidence at the trial the articles seized from him incident to his unlawful arrest.*

At the outset of the trial, appellant's counsel moved to suppress as evidence the television set, the crowbar and the sheet which were seized from appellant after his arrest. The trial court

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*With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 6, 34-39, 42-50, 141-147.

denied the motion and admitted into evidence the crowbar and the sheet as physical exhibits, as well as testimony identifying the television set as that which had belonged to the complaining witness. This evidence clearly was prejudicial to appellant because, had it been excluded, the jury would have had no basis on which to find appellant guilty of housebreaking and petit larceny.

As has already been shown, appellant's arrest without a warrant was illegal because the arresting officers had no probable cause for believing that appellant had committed any crime. Consequently, the seizure from appellant of the crowbar, the TV set and the sheet, whether the crowbar was found by the police officers as the result of a search of appellant's person, as appellant testified, or whether part of it was visible at the time of his arrest, as the officers testified, was a clear violation of appellant's rights under the Fourth Amendment which prohibits not only unreasonable searches, but also unreasonable seizures. United States v. Jeffers, 342 U.S. 48, 51; Wrightson v. United States,95 U.S. App. D.C. 390, 222 F.2d 556. All evidence obtained by the police as a result of appellant's illegal arrest was therefore inadmissible and should have been suppressed.

In this connection, it should be borne in mind that appellant was not being tried on the original charge of possession of an implement of crime, nor for the possession of stolen property,

but on an indictment for housebreaking and petit larceny. Nevertheless, the alleged implement of crime, the crowbar, and the presumably stolen TV set were obviously the principal pieces of evidence on which the jury reached its verdict of guilty of housebreaking and larceny.

It is well settled that an article taken from the person of an individual on the occasion of an illegal arrest is "fruit of the poisonous tree" and is not admissible in evidence against him. Wong Sun v. United States, supra, 484; Williams v. United States, 99 U.S. App. D.C. 161, 237 F.2d 789; Bynum v. United States, supra Kelley v. United States, supra; Gatlin v. United States, 117 U.S. App. D.C. 123, 326 F.2d 666. Being the "fruit" of an illegal arrest, search and seizure, the admission into evidence of the articles seized from appellant was prejudicial error sufficient to require a reversal of the conviction below.

III

The failure of the police to take appellant directly to the station house after his arrest, and to take him without unnecessary delay before a judicial officer, constituted a violation of Rule 5(a) of the Federal Rules of Criminal Procedure.*

Appellant was arrested in the 1400 block of Fuller Street, N.W., between 14th and 15th Streets, approximately five blocks west and six blocks south of the 10th Precinct station house at 750 Park Road, N.W. Instead of sending for a patrol wagon or scout car and taking appellant directly to the station house after his arrest, the arresting officers walked appellant back to 15th Street, away from the station house, and up 15th Street to King's car which was parked at the corner of 15th and Harvard Streets, placed the television set in the car, and then had appellant take them to the basement of the apartment house where he said he had bought the TV, and there developed evidence which was introduced at the trial for the purpose of discrediting appellant's statement as to where and under what circumstances he obtained the TV, the sheet and the crowbar. Only after this investigation did the arresting officers take appellant to the 10th Precinct station house and book him on charges of possession of an implement of crime and a dangerous

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*With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 12-14, 30-31, 41-42, 74, 102-106, 109-110, 117, 154, 167-168, 176-179, 183-185.

weapon, two of the articles which were seized from appellant at the time of his arrest.

Appellant was still in custody at the station house several hours later when Stokes was summoned to identify the TV set as that which he had previously reported to the police was missing from his apartment. In spite of the fact that appellant was then booked on a further charge of housebreaking, he was not taken before a judicial officer for commitment until the following day, after a line-up at Police Headquarters.

The procedure thus followed by the police during the period of approximately 24 hours following appellant's arrest was clearly contrary to the requirement of Rule 5(a) of the Federal Rules of Criminal Procedure that "An officer making an arrest .... without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States".

Although the factual situation differed to some extent in that a confession was involved, it is submitted that the following observation by the Supreme Court in Mallory v. United States, supra, is applicable to the present case:

> "The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step

> in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined."

Inasmuch as appellant was arrested without a warrant, it was incumbent upon the police to take him before a judicial officer as quickly as possible in order to determine whether there was probable cause for his arrest. The action of the police in holding appellant in custody for approximately 24 hours before doing so, was an unnecessary and unreasonable delay within the meaning of Mallory. Cf. Seals v. United States, 117 U.S. App. D.C. 79, 325 F.2d 1006; Gatlin v. United States, supra. Consequently, all of the evidence developed against appellant during his detention prior to his appearance before the committing officer was illegally obtained and should have been held inadmissible.

IV

> There was insufficient evidence to justify the verdict of the jury that appellant was guilty of housebreaking and petit larceny.*

The indictment on which appellant was tried and found guilty as charged contained two counts, as follows:

> (1) "On or about November 16, 1965, within the District of Columbia, Maurice Gaither, entered the apartment of Thomas S. Stokes, with intent to steal property of another."

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*With respect to Point IV, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 67-68, 74-75, 77-80, 109-110, 154-155, 170.

(2) "On or about November 16, 1965, within the District of Columbia, Maurice Gaither, stole property of Thomas S. Stokes, of the value of about $53.00, consisting of one television of the value of $50.00, one sheet of the value of $2.00 and $1.00 in money."

In order to support a conviction, the Government must prove every element of the indictment beyond a reasonable doubt. However, the evidence which was introduced at the trial of the present case failed to meet this requirement.

With respect to the first count of the indictment, there was no evidence that, on the day charged, appellant had entered the Stokes apartment with intent to steal property of another, or that he was any closer to the Stokes apartment house than the corner of 15th and Harvard Streets, approximately three blocks away. Appellant himself denied on the witness stand that he had either entered the Stokes apartment or stolen any property from Stokes. In this connection, it is significant that the only person who might have had any knowledge of what happened at the apartment during the time when it was allegedly entered by appellant, Stokes' mother, was not called by the Government as a witness. Also significant is the fact that Stokes himself testified that there were no marks on his apartment door which would indicate that it had been forced open by any implement, such as the crowbar which the police seized from appellant.

As to the second count, while Stokes identified as his the television set which appellant was carrying at the time of his arrest, he did not identify the sheet as his, nor did he testify that any of the money which he had left in his apartment before going to work was missing when he returned. Consequently, these two elements of the count were completely unproven.

It is apparent from the record that, except for identification of the TV set as that which belonged to Stokes, there was no direct evidence to support the allegations of the indictment. Although it is recognized that circumstantial evidence may be sufficient to warrant a conviction in a criminal case, it is urged that this rule should be limited to situations where the circumstances proved are wholly inconsistent with a theory of innocence. In the case at bar, the evidence was entirely consistent with appellant's testimony that he had neither entered the Stokes apartment nor stolen any property of Stokes, but had acquired the television set and the sheet, as well as the crowbar, from a stranger in the basement of the apartment house on 15th Street.

It is expected that appellee may contend that, because no motion was made by appellant at the trial for a directed verdict or judgment of acquittal on the ground of insufficiency of the evidence, this point may not now be raised on appeal. However, it is submitted that the insufficiency of the evidence in this case was a plain

defect affecting substantial rights of appellant which may be noticed by this Court, even though it was not brought to the attention of the trial court. Rule 52(b), Federal Rules of Criminal Procedure.

The judgment of conviction should therefore be reversed on the ground that the evidence was insufficient to support the verdict of the jury that appellant was guilty on both counts of the indictment.

CONCLUSION

In view of the foregoing considerations, appellant submits that the judgment of the District Court should be reversed.

Respectfully submitted,

/s/ Gordon W. Daisley
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed by first class mail this 12th day of December, 1966, to attorney for appellee, David G. Bress, United States Attorney, Room 3136-C, United States Court House Building, 3rd Street and Constitution Avenue, N.W., Washington, D.C.

/s/ Gordon W. Daisley
Gordon W. Daisley

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 20,209

MAURICE GAITHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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INDEX

TABLE OF CASES AND AUTHORITIES

*Cases chiefly relied upon are marked by asterisks.

IN THE
UNITED STATES COURT OF APPEALS FOR THE
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No. 20,209

MAURICE GAITHER,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR APPELLANT

APPELLEE'S MISSTATEMENTS OF THE FACTS
(Tr. 33-34, 72, 79, 80, 83, 100-101, 117)

Appellee has made several misstatements as to the facts of this case which, if left unnoted, might prejudice this Court against appellant. Appellant therefore deems it necessary to make the following comments on the misstatements in the brief for appellee.

In Question 1(a) of appellee's Statement of the Questions Presented, in paragraph I of the Summary of Argument (Appellee's Br. 5), and in the third paragraph of part I of the argument (Appellee's Br. 9), appellee states that the circumstances surrounding appellant's arrest included observation by the arresting officers of appellant as he was "leaving the area" carrying a television and "leaving a neighborhood with a reputation as one currently beset by housebreakings" (emphasis quoted). These statements are unsupported by the evidence, and the police officers themselves did not even intimate in their testimony that appellant's arrest was based in part on their observation of him "leaving the area" to which they had been assigned to combat housebreakings. On the contrary, Officer King testified that the area of the 10th Precinct to which he and his partner were assigned "runs from Park Road out past about 17th Street, I believe it is, and it starts at Euelid and goes on up to Buchanan" (Tr. 83). However, King and his partner first observed appellant at the corner of 15th and Harvard Streets, followed him southward for only about two blocks and arrested him after he had turned east on Fuller Street, between 14th and 15th Streets, at which time he obviously was not "leaving the area" identified by King.

In Question 1(c) of appellee's Statement of the Questions Presented, and in the third paragraph of part I of appellee's argument (Appellee's Br. 9), the television set which appellant was

carrying at the time of his arrest is characterized as a "late model", and as a "recently manufactured" television, for the obvious purpose of disparaging appellant's testimony that he had purchased the television for only $20.00. As a matter of fact, the television was a 1963 model which had been purchased for $169.95 on September 3, 1963, more than two years prior to the date of appellant's arrest, and, as the complaining witness, Stokes, himself admitted, had never been a good one, "it was one of those lemons" (Tr. 72, 80). One need only refer to the for sale advertisements in Washington newspapers for evidence that $20.00 is not an unusually low price for a portable television set more than two years old.

In Question I(d) of appellee's Statement of the Questions Presented, in the third paragraph of the Counterstatement of the Case (Appellee's Br. 2), and in paragraph I of the Summary of Argument (Appellee's Br. 6), mention is made of the fact that, during appellant's questioning by the police officers as to his possession of the crowbar, he stated that he "did not work". However, appellee ignores the fact that appellant also told the police officers that he attended night school, and that he was not questioned about what courses he was taking, or whether or not he was taking carpentry (Tr. 33-34). Under these circumstances, the mere fact that appellant was unemployed should not have given the police officers probable cause to believe that appellant's possession of a small crowbar was an indication that he had committed a crime.

In the fifth paragraph of appellee's Counterstatement of the Case (Appellee's Br. 3), appellee erroneously states that, when Stokes returned to his apartment at approximately 11:15 a.m. on November 16, 1965, "three quarters and four or five dimes" which had been left near his television were missing.[1/] As was pointed out in appellant's main brief (Appellant's Br. 28) Stokes did not testify that any of the money which he had left in his apartment before going to work was missing when he returned. On the contrary, as the trial court commented (Tr. 100-101), Stokes testified that he found nothing missing from his apartment other than the television set and the blue sheet, although he examined the place thoroughly (Tr. 79). Furthermore, the original police report which came to the 10th Precinct concerning Stokes' loss did not say that any money was missing (Tr. 117).

It is submitted that the above-mentioned inaccurate and/or misleading statements in appellee's brief should be ignored by this Court.

1/ In this connection, it will be borne in mind that the second count of the indictment charged appellant with petit larceny, including the stealing of $1.00 in money from the complaining witness, Stokes.

REPLY TO PART I OF APPELLEE'S ARGUMENT

(Tr. 10, 12, 15-16, 18, 28-30, 84-85, 89-90, 96, 116, 128, 129, 130-131, 164, 166-167)

Contrary to appellee's statement (Appellee's Br. 7) that appellant "appears to abandon" the contention that his arrest without a warrant was unlawful because the arrest was stated to be for possession of an implement of crime, i.e., the crowbar, appellant has not abandoned this contention, but maintains that, in view of the decision of this Court in Washington v. United States, 98 U.S. App. D.C. 100, 232 F. 2d 357, holding that the statute prohibiting the possession of implements of crime is unconstitutional as applied to crowbars, the fact that appellant's arrest was predicated on his possession of the crowbar is itself sufficient to render the arrest unlawful.

Appellee admits (Appellee's Br. 10, n.10) that it has found no case directly concerned with this issue. However, it would seem elementary that, if a criminal statute is unconstitutional, the arrest of a person for violation of that statute is unlawful.

In this connection, appellee refers to note 2 at page 3 of the slip opinion of this Court in Johnson v. United States, D.C. Cir. No. 20006, decided November 22, 1966, wherein it appears that the matter of possible unconstitutionality, for vagueness, of D.C. Code Section 4-140, defining disorderly conduct, was raised by the Court at argument and discussed in supplemental briefs. However, this

constitutional issue was not considered or decided by the Court in that case. In contrast to Johnson, where the statute involved was presumptively constitutional and the Court made no ruling on its possible unconstitutionality, appellant here was arrested for violation of a statute which, as applied to the possession of a crowbar, the ground of his arrest, had already been held unconstitutional.

Appellant does not urge, as appellee implies (Appellee's Br. 10-11), that "the arresting officer's improvident decision as to which criminal statute is applicable should be crucial", but agrees with appellee that the issue is whether the officer "had reasonable grounds to believe that appellant committed a crime" (emphasis quoted). In the present case, appellant did not commit any crime by being in possession of the crowbar, nor did his possession of the crowbar give the arresting officers reasonable grounds to believe that he had committed a crime. If, as appellee contends, "it is readily apparent that the arrest was predicated upon the officer's consideration that appellant had committed a larceny-housebreaking type crime" (Appellee's Br. 11), it is equally apparent that, at the time of the arrest, the officer should have charged appellant with such a crime, rather than arresting him for something which is not a crime. United States v. Gearhart, 326 F.2d 412, cited by appellee in support of its contention that the specific charge on which appellant was arrested should be considered collateral, is not in

point because the Court there held that, although the search warrants involved were legally defective, the defendant was lawfully arrested and that the ensuing search of his person and automobile required no search warrant for its validity.

In arguing that the facts and circumstances surrounding appellant's arrest gave the arresting officers probable cause to believe that a crime had been committed by appellant, appellee states (Appellee's Br. 8-9) that "the arresting officers observed him carrying a late model television, under the improbable shroud of a blue sheet, and a partially hidden crowbar, as well, as he was leaving a neighborhood with a reputation as one currently beset by house breakings", and that "When appellant answered [the arresting officers' inquiries] by first stating that he had purchased this recently manufactured television for but twenty dollars, ... his answers could reasonably had been thought incriminating".

However, as has been pointed out above, the television was not "a late model" or "recently manufactured", and appellant was not "leaving" the neighborhood to which the police officers were specially assigned because of recent housebreakings. Furthermore, it was not "improbable" that the television should have been covered by a sheet, because it was raining (Tr. 164); and being so covered, it is obvious that the arresting officers could not have "observed" whether or not the television was "a late model". Actually, the officers did not examine the television until after appellant had been arrested

(Tr. 29, 96). Consequently, knowing nothing about the vintage or other qualities of the television at the time when appellant said he had purchased it for $20.00, it is submitted that the police officers could not "reasonably have thought [appellant's answer] incriminating".

Appellee also urges as a significant circumstance that the arresting officer "observed appellant's quickening of his pace when he noticed the arresting officer following" (Appellee's Br. 9). In this connection, it should be borne in mind that the police officers were not in uniform, but were dressed in old clothes, trying to look like "duds" and as shabby as possible (Tr. 10, 84-85, 116, 129). It is therefore only natural that, seeing two such disreputable-looking men following him with an eye on the television set he was carrying, appellant should have quickened his pace. In each of the cases cited by appellee in support of this argument, the officers apparently were in uniform, and, in all but one case, were in police scout cars.

In arguing the question whether probable cause existed for appellant's arrest, appellee places particular emphasis on the decision of the Circuit Court of Appeals for the Seventh Circuit in United States v. Zimple,[2/] 318 F.2d 676, contending that the facts in

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2/ Erroneously cited by appellee as United States v. Zimble.

the Zimple case are "significantly similar to those present here" (Appellee's Br. 8, n.8). However, aside from the fact that both Zimple and appellant were stopped by police officers on a public street in an area to which the officers were specially assigned because of housebreakings and burglaries, and were questioned about their activities in the area, there is little significant similarity between the facts of the two cases.

In Zimple, the officers watched the defendant enter and leave each of two adjacent apartment buildings, staying a short time in each, and then approached him, identified themselves, told him that they were checking the area for suspects because of recent burglaries, and questioned him as to what he was doing. The officers then called two detectives who further questioned the defendant before he was placed under arrest on suspicion of burglary and searched, at which time three uncancelled letters were found in his pocket, later established to have been stolen from a mailbox. At the time of the search, defendant had inside his shirt another letter containing a government check which he had taken from another mailbox, and which, after his arrest, he tried to get rid of by throwing it on the floor in the Safety Building as he was walking along a corridor in the company of the arresting officers. After further questioning, the defendant asked to see a postal inspector and voluntarily wrote and signed a confession that he had stolen the four pieces of mail

from mailboxes. At the trial, the defendant moved to suppress the confession on the ground that it was the result of an illegal arrest and the product of an illegal seizure, but the motion was denied and the defendant was found guilty of stealing a letter from a mail receptacle. The facts in the Zimple case are thus significantly different from those here involved.

As appellee recognizes (Appellee's Br. 7), appellant contends that his arrest was without probable cause whether the time of the arrest be taken as that when he was initially stopped by the arresting officers for questioning, or the moment when, after being questioned, he was told by Officer King that he was under arrest, and has therefore argued the question of probable cause on these alternative premises.

As to the first alternative, i.e., that the arrest occurred before appellant was questioned, this premise does not conflict with appellant's testimony that the crowbar was not found in his possession until after he had been questioned because, under these circumstances, the "arrest" consisted of the action of the police officers in stopping appellant and restricting his liberty of movement, and did not involve any express statement by the officers as to the charge on which the arrest was based. Cf. Henry v. United States, 361 U.S. 98, 103.[3/] In this connection, appellee's contention (Appellee's Br. 10)

3/ See, also, the dissenting opinion in United States v. Zimple, supra, 680, wherein it was concluded that Zimple was arrested when the officers stopped and questioned him in the first instance, and that there was then no probable cause for his arrest on suspicion of burglary.

that neither appellant's testimony nor that of the officers establishes that appellant was not free to go when initially questioned, nor conscious of the restraint of "full liberty", is unrealistic when it is considered that, after calling to appellant to stop, the officers took up positions directly in front of and directly behind him, and kept him holding the television set for the express purpose of restraining his freedom of movement and preventing any attempt to escape (Tr. 15-16, 18, 28-29, 128, 130-131). Appellee's statement that appellant "chose to continue to hold the television, a fact seemingly inconsistent with any notion that he thought he had been arrested" is likewise unrealistic in view of appellant's testimony that, when Officer King showed his police badge, "I realized the consequences of the situation I was in" (Tr. 166-167). It was undoubtedly apparent to appellant from the attitude of the officers that they had no intention of letting him put the television down while questioning him.

Appellee's reliance upon Rios v. United States, 364 U.S. 253, Brown v. United States, 124 U.S. App. D.C. ___, 365 F.2d 976, Ellis v. United States, 105 U.S. App. D.C. 86, 264 F.2d 372, and Paris v. United States, 116 U.S. App. D.C. 112, 321 F.2d 378, in support of the contention (Appellee's Br. 10) that "mere temporary detaining for purposes of questioning does not necessarily describe an arrest" (emphasis quoted), is misplaced because none of these cases

contains any ruling as to what would constitute a "mere temporary detaining for purposes of questioning" which would not constitute an arrest.

In Rios, the Government's argument that the police had no intention to detain the petitioner beyond the momentary requirements of routine interrogation was rejected, the judgment of conviction below was vacated, and the cause was remanded to the District Court to determine the narrow question of when the arrest occurred by evaluation of the conflicting testimony of the witnesses. In Brown, the Court actually found that the appellant had been arrested when stopped because of traffic violations, so that the statement in the footnote concerning momentary "detaining" for questioning is clearly dictum. In neither Ellis nor Paris did the Court make any reference to "mere temporary detaining for purposes of questioning".

REPLY TO PART II OF APPELLEE'S ARGUMENT
(Tr. 6, 90-95, 147)

This part of appellee's argument appears to be based entirely on the fact that appellant's trial counsel did not object to the Government's rebuttal evidence concerning what took place when the arresting officers took appellant back to the basement of the apartment house where he said he had purchased the television and acquired the crowbar and the sheet, and does not refute appellant's contention that all of the evidence developed against

him between the time of his arrest and the time when he was taken before a magistrate for commitment, approximately 24 hours later, was illegally obtained and should have been held inadmissible. This evidence includes, not only the testimony of the police officers which was offered by the Government on rebuttal, but also the evidence offered during the Government's case in chief relating to the television set and the sheet, as well as the crowbar.

The fact that appellant's trial counsel did not object to appellee's rebuttal testimony is immaterial because, at the outset of the trial, he moved to suppress all of the evidence with respect to the television, the sheet, the crowbar, the knife, and the coins which were seized from appellant incident to his arrest (Tr. 6). When, after hearing evidence and argument on the motion, the Court denied appellant's motion to suppress, it would have been futile to object to the testimony of the police officers concerning the television set, the sheet and the crowbar, although appellant's counsel did again object to the receipt in evidence of the television purchase agreement, the sheet and the crowbar (Tr. 147). Since the television set itself was not offered in evidence, the only objection to the testimony relating thereto was that encompassed by appellant's original motion to suppress.

Incidentally, appellee is in error in stating (App. Br. 12) that appellant's trial counsel objected to the Government developing

during its case in chief the fact that appellant had been taken back to the apartment house by the police officers, a position which the trial court sustained, because the Court itself, not appellant's counsel, interrupted the direct examination of Officer King and ruled that he could not be examined during the Government's case in chief as to what happened at the apartment house (Tr. 90-95).

The fact that, after appellant's motion to suppress all of the evidence pertaining to the television, the sheet and the crowbar had been denied, appellant testified as to his purchase of the television and about leading the arresting officers to the apartment house where he had bought the set, should not deny appellant the right to renew before this Court his contention that all of the evidence developed against him between the time of his arrest and his appearance before the committing officer was illegally obtained and should have been held inadmissible in accordance with the original motion to suppress.

REPLY TO PART III OF APPELLEE'S ARGUMENT

In contending that the circumstantial evidence presented by the Government clearly supported the jury's verdict that appellant was guilty of both offenses charged in the indictment (Appellee's Br. 13), appellee does not contradict any of the reasons given by appellant for attacking the evidence as insufficient to justify the

verdict of the jury (Appellant's Br. 26-29), but urges only that no motion to challenge this verdict was made by appellant's trial counsel, and that the trial court properly instructed the jury, without objection, on both the inference permissible from possession of recently stolen goods, and the question of reasonable doubt.

Appellant agrees that the instructions to the jury were proper, but asserts that the insufficiency of the evidence was such that the jury clearly erred in not finding that the Government had failed to sustain its burden of proving the appellant guilty beyond a reasonable doubt as to every element of the offenses with which he was charged. The failure of appellant's trial counsel to challenge the verdict of the jury cannot deprive this Court of the power, under Rule 52(b), Federal Rules of Criminal Procedure, to recognize the insufficiency of the evidence as a plain defect affecting substantial rights of appellant, even though it was not brought to the attention of the trial court.

CONCLUSION

In view of the foregoing considerations and those set forth in appellant's main brief, it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

/s/ Gordon W. Daisley
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant was mailed by first class mail this 3rd day of February, 1967, to attorney for appellee, David G. Bress, United States Attorney, Room 3136-C, United States Court House Building, 3rd Street and Constitution Avenue, N.W., Washington, D.C.

/s/ Gordon W. Daisley
Gordon W. Daisley

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,209

MAURICE GAITHER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

JOHN R. RISHER, JR.,
Attorney, Department of Justice.

Cr. No. 1315-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Did the trial court properly rule that there was probable cause for the arrest (without a warrant) of appellant? More particularly, did probable cause exist when police officers, specially assigned to an area because of a current series of housebreakings:

(a) observed appellant as he was leaving the area carrying a television covered by a blue bed sheet and with a crowbar tucked into his pants;
(b) began to follow and noticed that appellant quickened his pace when he appeared to observe them;
(c) stopped appellant to question him and were told that he had just purchased the late model television for twenty dollars from an unknown person at an address which was on the street which appellant was approaching when first observed;
(d) and were also told that this same person had given appellant the crowbar but appellant did not work?

2) Was the introduction of rebuttal testimony by the Government's witnesses, assuming that the testimony was otherwise inadmissible, plain error?

3) Was the evidence sufficient to sustain the jury's verdict?

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MAURICE GAITHER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

A two-count indictment charging appellant with housebreaking, 22 D.C. Code § 1801, and larceny, 22 D.C. Code § 2202, was filed on December 20, 1965. Appellant was arraigned, pleaded not guilty, and was tried by jury in March, 1966. A verdict of guilty was returned on each count and appellant was sentenced under the Youth Correction Act.[1]

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[1] 18 U.S.C. § 5010(b).

Prior to commencement of the trial appellant's counsel moved to suppress the evidence which had been seized from appellant incident to his arrest. An evidentiary hearing was held and the following facts adduced: Officers Joseph J. King and Robert P. Ropel of the Metropolitan Police Department were specially assigned to the Tenth Precinct Tactical Force because of a recent series of housebreakings (Tr. 10, 15, 24). On the morning of November 16, 1965, at approximately 11:15-11:30, they observed the appellant walking towards the intersection of 15th and Harvard Streets, N.W., from the west, turn the corner and proceed south on 15th Street (Tr. 9-11, 16, 23, 25). Appellant was carrying a 1963-model television, partially covered by a blue bed sheet (Tr. 16, 25). Officer King crossed the street, and he and Officer Ropel began to follow appellant. As he followed, Officer King saw the head of a crowbar which had been tucked into the rear of appellant's pants. He also saw that appellant had observed him and quickened his pace. (Tr. 18, 20-21, 22, 23).* He then called out to appellant to stop and approached, identified himself and displayed his badge. Appellant exclaimed: "I'll be damned." (Tr. 11, 28).

As Officer Ropel stood by, Officer King asked appellant where he had acquired the television. Appellant stated that he had just purchased it for twenty dollars from an unidentified male at an unknown address two blocks north on 15th Street (Tr. 11-12, 29). He further stated that he did not work and had been given the crowbar when he purchased the television (Tr. 12, 19, 29-30). Officer King then arrested him for possession of a burglary tool, *i.e.*, the crowbar, and seized it, the television, bed sheet, and a knife and money which were in appellant's pockets (Tr. 12, 20, 32).

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* Appellant did not testify during the hearing on the motion. During the trial he testified that the crowbar was not visible but that Officer King detected it as they were walking back to the building where he had purchased the television (Tr. 154). He also denied that he had been observed proceeding east on Harvard Street, stating that he was trying to hail a taxicab (Tr. 154) and that the television was covered because it was raining (Tr. 164).

Appellant did not testify at the hearing. The trial judge denied the motion, ruling that there was probable cause for the arrest, albeit for possession of the crowbar (Tr. 45-50).

B. The Facts Surrounding the Offense

At 9:00 a.m. on November 16, 1965, Thomas A. Stokes left his mother in his apartment at 1613 Harvard Street, N.W. (Tr. 66-67). He later received a telephone call from her; immediately returned, arriving at approximately 11:15 a.m. and was met by her (Tr. 78). His television, which he had used that morning, and the "three quarters and four or five dimes" which had been located near it were missing (Tr. 69-71, 73). Later, he discovered that a blue bed sheet was also missing (Tr. 71). He immediately reported the theft of the television to the police, having given no one permission to enter his apartment nor use the television (Tr. 73, 75-76).

At approximately 11:15 a.m., on the same day, Officers King and Ropel observed appellant proceeding east on Harvard Street, turn the corner, and walk south on 15th Street. As it developed, appellant was carrying Mr. Stokes' television which was still warm. The set was covered by a blue sheet of the same make as the one missing from the Stokes' apartment (Tr. 86-87, 88-89, 96, 102-03). Officer King began to follow and noticed a crowbar was tucked into the rear of appellant's pants (Tr. 87), and that appellant turned towards him and then began to quicken his pace and crossed the street (Tr. 115-16, 153). He called out to appellant to stop, approached, identified himself and displayed his badge (Tr. 88, 154). Appellant then exclaimed: "I'll be damned" (Tr. 88, 107-08, 122-23, 166).

Appellant was then asked where he had acquired the television, and responded that he had just purchased it from an unknown male, who had stopped him on 15th Street, for twenty dollars (Tr. 88, 123, 154). He further stated that this person had given him the crowbar and sheet (Tr. 95-96, 124, 162). He was then arrested;

Officer King examined the television and discovered it was warm (Tr. 89-90, 96). Officer King searched him; currency and five quarters and four dimes were found in his pockets (Tr. 102).[3]

Appellant testified that while returning from the bank he was approached by an unknown male in the 3000 block of 15th Street who offered to sell, among other things, the television which was located in the basement of a building. This he purchased and he also took the sheet and the crowbar (Tr. 152-53, 157). The television, although it was not being used, was warm (Tr. 163). Appellant further testified that he led the arresting officers to the place of purchase (Tr. 154). On cross-examination he denied having stated to Officer King that the unknown male had departed by the back door (Tr. 168).[4] Officer King, in rebuttal, however, testified that appellant had so stated and that when he and appellant opened the back door there were two policemen who had been stationed there since prior to the indicated time of the alleged sale (Tr. 178-79). Officer Pleger, who was one of the officers so stationed, testified that at the time he saw the appellant and King he had had the back door under observation for approximately forty-five minutes and no one had exited through it (Tr. 182-85).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides in pertinent part:

> Whoever shall, either in the night or in the daytime break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether

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[3] Officer King received the written report of this theft at 2:00 p.m., November 16, 1965 (Tr. 104-106). As appellant concedes, a written complaint for housebreaking was then filed.

[4] Officer King had so testified during the hearing on the motion to suppress (Tr. 13).

> at the time occupied or not, . . . to commit any criminal offense shall be imprisoned not more than fifteen years.

Title 22, District of Columbia Code, Section 2202, provides in pertinent part:

> Whoever shall feloniously take and carry away any property of a value of less than $100 . . . shall be fined not more than $200 or be imprisoned for not more than one year, or both . . . .

Title 23, District of Columbia Code, Section 306, provides in pertinent part:

> (a) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of any section listed in subsection (b), by police officers, as in the case of a felony, upon probable cause that the person arrested is violating the section involved at the time of the arrest.
>
> (b) Subsection (a) shall apply with respect to section 22-3601 (possession of implements of crime) . . . .
>
> (c) Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of section 22-2202 (petit larceny), by police officers, as in the case of a felony, upon probable cause that the person arrested has in his possession at the time of the arrest, property taken in violation of that section

* * * *

SUMMARY OF ARGUMENT

I

While specially assigned to combat a series of housebreakings in the area, police officers observed appellant leaving the area, carrying a 1963-model television, wrapped in a blue sheet, and a crowbar tucked into the rear of his pants. When followed, the appellant quickened his pace; accordingly he was stopped and questioned. In

reply to questions, appellant stated that he had just purchased the television for $20 from an unknown male at an unknown address on 15th Street. However, the appellant had been observed approaching, rather than proceeding on, 15th Street. Appellant further replied that he had taken the crowbar and bed sheet at the same time and did not work. These facts gave the police, who thereupon arrested appellant, probable cause to arrest and the property seized incident to that valid arrest was therefore properly admitted into evidence.

II

Appellant's defense was that he had purchased the television from an unknown person at a place which he could locate; but the address of which he did not know. While testifying on direct examination he stated that he had taken the police to this place after his arrest. The Government, in rebuttal, called the arresting officer who verified that appellant had taken him to the alleged place of purchase but testified further that there was no trace of the alleged seller of the television. The officer also testified that appellant had informed him that the seller of the television had departed by the rear door. Another police officer then testified that no one had departed through the door. No objection was made to this testimony which was quite proper in view of appellant's testimony about collateral matters.

III

The trial judge properly instructed the jury that it might infer guilt from the possession of the recently stolen articles unless it believed appellant's explanations. Appellant's counsel made no objection to this instruction nor to the proper charge concerning reasonable doubt; nor moved for a judgment of acquittal. Therefore, appellant cannot now challenge the sufficiency of the evidence of guilt.

ARGUMENT

I. The trial court correctly ruled that the seizure of the television, bed sheet, crowbar and money in appellant's possession was incident to a lawful arrest.

(Tr. 10-16, 19, 21-25, 28-30, 32, 52)

Appellant contends that the ruling on the motion to suppress the evidence seized at the time of appellant's arrest without a warrant was improper because probable cause for the arrest did not exist. This contention is based upon his assertion that the arrest occurred when he was stopped by the arresting officers;[5] or, if later, because the arrest was stated to be for possession of an implement of a crime, *i.e.*, the crowbar.[6] Appellant, however, appears to abandon this latter contention for his argument in his brief extends to all of the circumstances surrounding the arrest and not only to possession of the crowbar. Nevertheless, it is clear that the arrest was based upon probable cause and the search, which was admittedly incident to it, lawful.

Probable cause is established if the "officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson*

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[5] To adopt appellant's contention that mere stopping to question, absent any objective evidence of intent to restrain of full liberty, constitutes an arrest would lead to a rule prohibiting any stopping, no matter what the circumstances. The instant case must be distinguished from the so-called "arrest for investigation," involving the likes of a stationhouse custody.

It should be noted also that the detention here arose out of the occasion of immediately observed circumstances and was designed to ascertain immediately available information. See, *e.g.*, *Lee* v. *United States*, 95 U.S. App. D.C. 156, 157, 221 F.2d 29, 30 (1954).

[6] See Title 22, D.C. Code 3601. See, also, *Washington* v. *United States*, 98 U.S. App. D.C. 100, 232 F.2d 357 (1956); *Benton* v. *United States*, 98 U.S. App. D.C. 84, 232 F.2d 341 (1956), holding the statute to be unconstitutional when applied to possession of a crowbar.

v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962).[7] It is a legal concept which does not require that the officer know such facts as are necessary to prove commission of a crime. *Brinegar* v. *United States*, 338 U.S. 160, 172-73 (1948); indeed he need not know *what* crime has been committed so long as the facts and circumstances reasonably support belief of the commission of a crime. *E.g.*, *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508 (1960), *cert. denied*, 364 U.S. 919 (1960); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82 (1958), *cert. denied*, 358 U.S. 885 (1958). See also *United States* v. *Zimble*, 318 F.2d 676 (7th Cir. 1963), *cert. denied*, 375 U.S. 868 (1963).[8] In considering if the facts and circumstances surrounding the arrest serve to establish probable cause, such factors as the following are considered relevant: *(1)* the reputation of the area, see, *e.g.*, *Carroll* v. *United States*, 267 U.S. 132, 160 (1924); *United States* v. *Zimble*, *supra*, at 679; *Ellis* v. *United States*, *supra*; *(2)* the nature and manner of responses to the police, see *e.g.*, *Bell* v. *United States*, *supra*, at 388, 254 F.2d at 84, 87; *(3)* material possession observed on or about the person, see, *e.g.*, *Dixon* v. *United States*, *supra*; *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F.2d 476 (1953). In the instant case each was present under persuasive incriminating circumstances.

Appellant contends, nevertheless, that the circumstances did not establish probable cause for his arrest. But this argument ignores the significance of the fact that the arresting officers observed him carrying a late model television, under the improbable shroud of a blue sheet,

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[7] Accord, *Henry* v. *United States*, 361 U.S. 98 (1959); *Stephens* v. *United States*, 106 U.S. App. D.C. 249, 251 Fn 3, 271 F.2d 832, 834 (1959); *Ellis* v. *United States*, 105 U.S. App. D.C. 86, 88, 264 F.2d 372, 374 (1959), *cert. denied*, 359 U.S. 998 (1958).

[8] The facts in the *Zimble* case are significantly similar to those present here, the only meaningful distinction appearing to be appellant's possession of the crowbar.

and a partially hidden crowbar, as well, as he was *leaving* a neighborhood with a reputation as one currently beset by housebreakings. Certainly these circumstances justified their directing a few inquiries to him. See, *e.g.*, *Carroll* v. *United States*, *supra*, at 160; *United States* v. *Zimble*, *supra*, 318 F.2d at 679; *Dixon* v. *United States*, *supra*, at 306, 296 F.2d at 428; *Bell* v. *United States*, *supra*, at 388, 254 F.2d at 83. When appellant answered by first stating that he had purchased this recently manufactured television for but twenty dollars, from an unknown male, at an unknown address located north on 15th Street, but had been observed walking towards 15th Street, his answers could reasonably have been thought incriminating. His further response that the crowbar had been given to him, *not purchased*, by the same unknown person for no apparent reason established probable cause for his arrest. Not to be ignored, are the additional circumstances that the arresting officer had appellant under observation while questioning him, had heard the exclamation when he was stopped as well as observed appellant's quickening of his pace when he noticed the arresting officer following. See *Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1966); *Zimble* v. *United States*, *supra*, 318 F.2d at 679; *Campbell* v. *United States*, 110 U.S. App. D.C. 109, 111, 289 F.2d 775 (1961); *Bell* v. *United States*, *supra*, at 388, 254 F.2d at 86.

Appellant however argues that the arrest occurred before he was questioned.[9] Yet, it is clear that none of the cases which he cites in support of this position is applicable for in each the time of arrest was determined with regard to the time of the search which immediately followed stopping or entering. In the instant case, however, appellant's own testimony is that the search fol-

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[9] This contention appears somewhat in conflict with appellant's testimony that the crowbar was not detected until after appellant had begun to return to the 15th Street address since the arrest was for "possession of the crowbar." See Tr. 154.

lowed his answers to the above questions (Tr. 154); and neither his nor the officers' testimony serve to establish that appellant was not free to go when initially questioned nor conscious of a restraining "of full liberty." See *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 218, 295 F.2d 555, 563-65 (*en banc* 1961), *cert. denied*, 369 U.S. 813 (1962). Compare *Seals* v. *United States*, 117 U.S. App. D.C. 79, 81, n.4, 325 F.2d 1006, 1008 (1963), *cert. denied*, 376 U.S. 969 (1964). Although appellant's counsel places much emphasis on this "detention" for purposes of questioning by referring to the positions which the officers assumed and their explanation why appellant continued to hold the television (Tr. 15-16), it is clear that *mere temporary detaining* for purposes of questioning does not necessarily describe an arrest. See *Rios* v. *United States*, 364 U.S. 253 (1960); *Brown* v. *United States*, 124 U.S. App. D.C. ——, 365 F.2d 976, 979 n.4 (1966); *Ellis* v. *United States*, *supra*. See also *Paris* v. *United States*, 116 U.S. App. D.C. 112, 321 F.2d 378 (1963). Furthermore, this conduct by the officers appears to indicate no more than prudence and not a contradiction of their testimony about when appellant was arrested. Significantly, appellant chose to continue to hold the television, a fact seemingly inconsistent with any notion that he though he had been arrested.

Appellant also argues that the arrest was unlawful because expressed to have been for possession of a burglary tool, *i.e.*, the crowbar.[10] He would thus urge that

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[10] See note 6, *supra*. The Government has found no case directly concerned with the precise issue, *i.e.*, what effect does the fact that the officer cites a statute found to be unconstitutional have on the arrest. See, however, *Johnson* v. *United States*, D.C. Cir. No. 20006, decided November 22, 1966, slip op. at 3 n.2.) It would appear that the most significant reason for advising of the grounds of the arrest is to advise of the charge(s), *cf. Miranda* v. *Arizona*, 384 U.S. 436 (1966), and possibly to preclude unlawful arrest. See American Law Institute, Code of Crim. Proc., Official Draft, June 15, 1930, pp. 247-50. It taxes the imagination to think that there was any doubt in appellant's mind about the reason for the arrest.

the arresting officer's improvident decision as to which criminal statute is applicable should be crucial. But as *Bell* v. *United States*, *supra* at 387, 254 F.2d at 86, holds, the arresting officer need not *know* specifically what crime has occurred, nor is the issue what name the officer attaches; rather it is whether he had reasonable grounds to believe that appellant committed *a* crime. See also, *United States* v. *Zimble*, *supra*; *Chappell* v. *United States*, 119 U.S. App. D.C. 356, 359, 342 F.2d 935, 939, n.5 (1965); *Payne* v. *United States*, 111 U.S. App. D.C. 94, 96, 294 F.2d 723, 725, *cert. denied*, 368 U.S. 883 (1961); *Dixon* v. *United States*, *supra*. Further, this is not a case where the arresting officer's decision as to which criminal statute he should base the arrest upon subjected appellant to the chance that there just might exist some proper criminal statute which proscribed his conduct. Instead it is readily apparent that the arrest was predicated upon the officer's consideration that appellant had committed a larceny-housebreaking type crime. That the officer could not at the moment be more specific should be of little moment and the issue presented by the specific charge which he chose to cite should be considered collateral. See *United States* v. *Gearhart*, 326 F.2d 412, 414 (4th Cir. 1964); *People* v. *Maddox*, 46 Cal. 301, 305, 294 P.2d 6, 9 (1956) (Traynor, J.).

II. Having failed to object to the Government's rebuttal evidence, appellant cannot now urge it as error on appeal.

(Tr. 93-94, 102, 104-06, 154, 168, 170, 176, 178-79, 183-85)

After appellant was arrested he led the police to the basement of the apartment where he had allegedly purchased the television and acquired the crowbar and the sheet (Tr. 154, 176). The unknown seller was not present nor were there any indications that he had been (Tr. 167-68). Present, behind the building were two police officers, one of whom testified during rebuttal that no

one had exited from the basement during or after the period that appellant testified he had purchased the television (Tr. 170, 178-79, 183-85). Appellant was then taken to the police station and booked (Tr. 102, 104-06, 154).

Appellant now contends that this delay, occasioned when he led the police to the apartment, was in violation of Rule 5(a), Federal Rules of Criminal Procedure, and therefore improperly used to develop evidence which was offered to discredit his testimony about the circumstances of his purchase of the television. He further asserts that he was not taken before a magistrate until the following day and that therefore all evidence developed after the alleged delay was inadmissible.

Appellant's experienced trial counsel objected to the Government developing during its case in chief the fact that appellant had been taken to the apartment (Tr. 93-98), a position which the trial court sustained (Tr. 90-94). However, he offered no objection to such testimony in *rebuttal;* therefore, the issue is not properly before this Court on appeal. *United States* v. *Miller*, 353 F.2d 724 (2d Cir. 1965); *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Williams* v. *United States*, 113 U.S. App. D.C. 399, 9400, 308 F.2d 652, 653 (1962); *cert. denied*, 372 U.S. 970 (1962); *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F.2d 378, 380 (1961).[11]

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[11] It should be noted that on direct examination appellant testified that he did not enter the Stokes' apartment; but had purchased the television. He then testified about leading the police to the apartment, thereby advising the jury for the first time of this event (Tr. 154). On cross-examination when asked if he had stated to the officers that the seller of the television had exited through the back door he denied it (Tr. 168). See note 4, *supra*.

There is no indication that the return to the apartment was intended to develop evidence against appellant, *cf. Mallory* v. *United States*, 354 U.S. 449 (1954); *Naples* v. *United States*, 113 U.S. App. D.C. 281, 307 F.2d 618 (*en banc*, 1962); *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964). Rather the purpose of the return appears to have been to verify appellant's statements, an apparently *reasonable* measure. Compare *Kennedy*

III. The evidence was sufficient to support the verdict.

(Tr. 229-30, 238-40)

The circumstantial evidence presented by the Government, set forth in detail *supra*, clearly supported the jury's verdict of guilty of both offenses. See *Wood* v. *United States*, 120 U.S. App. D.C. 163, 344 F.2d 548 (1965); *Bray* v. *United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962); *United States* v. *Lefkowitz*, 284 F.2d 310 (2d Cir. 1960); *Anglin* v. *Maryland*, Md. Ct. of App. No. 498, decided December 13, 1966. No motion to challenge this verdict was made by trial counsel. Further, the court properly instructed the jury, without objection (Tr. 240), on both the inference permissible from possession of the recently stolen goods (Tr. 238-39), and reasonable doubt (Tr. 229-30). See *Holland* v. *United States*, 348 U.S. 121, 139 (1954); *Robertson* v. *United States*, —— U.S. App. D.C. ——, 364 F.2d 702 (1966); *Scurry* v. *United States*, 120 U.S. App. D.C. 374, 347 F.2d 468 (1965); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947).

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v. *United States*, 122 U.S. App. D.C. 291, 293, 353 F.2d 462, 463-64 (1965).

Moreover, appellant had not only denied the crime itself but testified about this collateral matter, thereby justifying the rebuttal testimony. Compare *Walder* v. *United States*, 347 U.S. 62 (1954); *Inge* v. *United States*, 123 U.S. App. D.C. 6, 356 F.2d 345, 349 (1966); *Tate* v. *United States*, 109 U.S. App. D.C. 13, 283 F.2d 377 (1960).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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